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In The
Supreme Court of the United States

1690 COBB L.L.C. d/b/a WATERPIPE WORLD,
and ERIK CLABAUGH

and

INSERECTION, A FANTASY STORE, and ERIK CLABAUGH,

Petitioners,

v.

THE CITY OF MARIETTA, BILL DUNAWAY, In his official capacity as Mayor of THE CITY OF MARIETTA, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, And PHILIP GOLDSTEIN, In their official capacity as Members of THE MARIETTA CITY COUNCIL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the State of Georgia's ban on the dissemination of sexual devices to adults violate petitioners' substantive due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and this Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 156 L. Ed. 2d 508 (2003)?

2. Does the City of Marietta's revocation of petitioners' business licenses because of petitioners' past sale of sexual devices to adults violate petitioners' rights to continue to disseminate non-obscene expressive works protected by the First and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

1690 COBB L.L.C. d/b/a WATERPIPE WORLD,

ERIK CLABAUGH,

INSERECTION, A FANTASY STORE,

Petitioners.

THE CITY OF MARIETTA,

BILL DUNAWAY, in his official capacity as Mayor of the CITY OF MARIETTA,

BETTY L. HUNTER,

PETE WALDREP,

JOHNNY SINCLAIR,

ANDY MORRIS,

ANTHONY COLEMAN,

JIM KING, And

PHILIP GOLDSTEIN,

In their official capacities as Members of the MARIETTA CITY COUNCIL

Respondents.

PARENT AND SUBSIDIARY COMPANIES

The parent corporation of 1690 Cobb L.L.C. d/b/a Waterpipe World is Midtown Visuals, Inc., a Georgia corporation. Inserection does not have a parent corporation.

Erik Clabaugh is an individual.

No publicly held company owns ten percent (10%) or more of the stock of either petitioner.

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OPINIONS AND ORDERS BELOW

The opinions and orders below have not, to petitioners' knowledge, been published in any official or unofficial reporters.

JURISDICTION OF THIS COURT

The order of the Superior Court of Cobb County, Georgia, affirming the Marietta City Council's revocation of petitioners' business licenses was issued on May 12, 2004. The Georgia Court of Appeals denied review by order dated July 7, 2004. The Georgia Supreme Court denied petitioners' requested writ of certiorari by order dated October 25, 2004.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257 and Rules 10(c) and 13 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 16-12-80:

> (a) A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this Code section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and

reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;
(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and
(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) of this paragraph:
(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
(B) Acts of masturbation;
(C) Acts involving excretory functions or lewd exhibition of the genitals;
(D) Acts of bestiality or the fondling of sex organs of animals; or
(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

(d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:
(1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or
(2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.
(f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature.

STATEMENT OF THE CASE

Petitioners operate retail stores in the City of Marietta under licenses issued by the City permitting them to operate as general merchandise retail establishments with no more than twenty percent (20%) of their total retail floor space, revenue, and

stock in trade accorded to adult videos and other adult items defined in § 8-20-020 of the City Code (see petitioners' licenses at Appendix ["A"] 69-70, 78-79). The City barred petitioners from offering sexual devices for sale or display in their premises (A 69-70, 78-79).

On June 6, 2003, Scott Everingham, City of Marietta Business License Manager, sent a letter to each store warning them to halt the sale of items prohibited by O.C.G.A. § 16-12-80 to avoid revocation or suspension of their licenses. On June 13, 2003, Mr. Everingham caused a letter to be hand-delivered to each petitioner's store advising that Mr. Everingham would conduct a hearing on June 18, 2003, to determine whether the store's business license would be suspended or revoked. As to each store, the entire notification of the charges set forth only:

> "The basis for the hearing on whether to suspend or revoke the above license is set forth in Marietta City Code Section 8-4-405(5) (3) which provides as follows: 'An applicant has knowingly allowed the violation of an ordinance of the city or a violation of any criminal law of the State of Georgia (a misdemeanor or a felony) to occur on the premises; and that such violation is materially related to the operation of said business.'"

(A 35, 54).

After conducting the hearing, Mr. Everingham issued a letter to each petitioner on June 23, 2003,

ordering revocation of its business license as of that date, subject to appeal of said revocations. In pertinent part, Mr. Everingham found that petitioners had sold sexual devices prohibited by the City and by the State of Georgia, in violation of the license conditions (A 36-40, 55-58). On July 1, 2003, petitioners filed notices of appeal with the Mayor and the Council, as set out in Marietta Code § 8-4-405.

On August 13, 2003, petitioners appeared before the Marietta City Council, which heard the appeal and voted to uphold the ordered revocations. The Council ruled orally that the revocations would take effect on August 15, 2003. No written ruling from the Council was ever sent to either of the petitioners.

On August 15, 2003, petitioners filed petitions for a writ of mandamus and a writ of certiorari with the Superior Court of Cobb County (A 24-33, 43-52). The Superior Court issued an order on January 29, 2004, setting a special hearing on these cases for March 18, 2004. At that hearing, the court heard oral arguments on the petitions and on the City's motion to dismiss based on mootness.

On May 12, 2004, the Superior Court affirmed the Marietta City Council's license revocations and denied the petitions. Despite ruling on the merits of the petitions, and rejecting the petitioners' contentions that they had a substantive due process right to disseminate sexual devices to consenting adults, the Superior Court also granted the City of Marietta's motion to dismiss based on the expiration of the time period of the business licenses (A 3-11, 13-21).

The petitioners thereafter sought discretionary review of the Superior Court's order. The Georgia Court of Appeals denied their applications by order dated July 7, 2004 (A 2). The petitioners' request for certiorari to the Court of Appeals from the Georgia Supreme Court was denied by an order of that court dated October 25, 2004, and served by mail to petitioners on Wednesday, October 27, 2004 (A 1). The City's letter serving petitioners with the Georgia Supreme Court's order also states: "The purpose of this letter is to give your clients until 9:00 a.m. on Monday, November 1, 2004 to cease all operations within the City of Marietta" (A 22-23).

The petitioners are currently continuing to do business under this threat of impending closure by the City. Petitioners have applied to the Honorable Justice Anthony M. Kennedy for a stay pursuant to 28 U.S.C. § 2101(f) and Rule 23 of the Rules of this Court, seeking equitable intervention by the Court for the purpose of allowing petitioners sufficient time to file this petition for a writ of certiorari and to obtain the Court's decision thereon.

REASONS FOR GRANTING WRIT

POINT I

The Due Process Clause Guarantees the Petitioners the Right to Offer Sexual Devices for Sale to Adults

A. Introduction

The logical application of the Court's ruling in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), renders unconstitutional the State of Georgia's prohibition of the dissemination of sexual devices to adults on the ground that such devices are obscene *per se*. O.C.G.A. § 16-12-80(c). Such a law, predicated on conceptions of public morality enforced by the State through the criminal code, derogates the privacy protections recognized by *Lawrence* to follow from the Due Process Clause.

Georgia, and a handful of other states (seven, by petitioners' count) explicitly ban the sale or dissemination of sexual devices. Some state courts have recognized a federal right of privacy arising from the Due Process Clause of the Fourteenth Amendment that protects an individual's right to obtain sexual devices for *bona fide* medical and psychological therapeutic needs. *See, e.g., State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colorado 1985). Others, like the Supreme Court of Louisiana, have recognized an individual's right to possess sexual devices in the privacy of her home, but not a corresponding right to promote or sell such devices.

State v. Brenan, 772 So.2d 64 (20001); *see also, State v. Yorko*, 690 S.W.2d 260 (Tex. Crim. App. 1985).

Petitioners contend that, in light of this Court's decision in *Lawrence,* individuals have a substantive due process right to obtain and use sexual devices in private, and that this right is not predicated on a medical or psychological therapeutic need. Further, petitioners maintain that the Fourteenth Amendment protects their rights to sell or otherwise disseminate sexual devices to adults for use in private. Since these are important questions of federal law that concern the Georgia courts' refusal to recognize petitioners' substantive due process rights under both the Fourteenth Amendment and this Court's decision in *Lawrence v. Texas, supra,* the requested writ of certiorari should issue to allow petitioners a full and fair opportunity to vindicate their federal constitutional rights.

In affirming the City of Marietta's revocation of the petitioners' business licenses, the Superior Court of Cobb County specifically found that the license revocations were justified because "[t]he sex toys and other evidence in this case constitute an obscenity under O.C.G.A. § 16-12-80 (c) and [ ] the sale of such items is unlawful under O.C.G.A. § 16-12-80 (A 10, 20). These decisions, allowed to stand by both the Georgia Court of Appeals and the Georgia Supreme Court, deprive the petitioners of their rights to due process of law. Moreover, the threatened closure of petitioners' retail stores because of past sales of purportedly *per se* obscene sexual devices will work an unavoidable First

Amendment injury by suppressing the petitioners' lawful dissemination of other non-obscene materials.

B. The Due Process Clause Guarantees Petitioners' Rights to Disseminate Sexual Devices to Adults

The Court recently reaffirmed that individual liberty interests are, in certain important respects, shielded from State interference, particularly where privacy concerns are implicated. As Justice Kennedy, writing for the Court, observed in *Lawrence*:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Lawrence v. Texas, 539 U.S. at 562, 123 S. Ct. 2472. In keeping with the constitutional tradition noted by the *Lawrence* Court, petitioners respectfully submit that the purchase and private use of sexual devices by adults is a sphere of an American citizen's life "where the State should not be a dominant presence," *Id,* and autonomy of self should control. The State of Georgia should not be permitted to enforce a moral code that interferes with the dissemination of devices that are used by

consenting adults during lawful private sexual conduct.

Rejecting the constitutionality of the State of Texas' law criminalizing consensual sodomy between individuals of the same sex, five Justices of this Court in *Lawrence* construed the Due Process Clause of the Fourteenth Amendment to provide substantive protection to private sexual choices made by adult citizens:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. **Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.** "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its

> intrusion into the personal and private life of the individual.

Lawrence v. Texas, 539 U.S. at 578, 123 S. Ct. 2472 (citation omitted; emphasis added).

Expressly overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), the *Lawrence* Court recognized both the liberalization of American society's attitude toward the private sexual choices of its citizens, as well as the judicial extension of constitutional due process protections to those choices. From the rights to privacy acknowledged in *Griswold v. Connecticut*, 381 U.S. 479, 855 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (invalidating a state law prohibiting the use of contraceptive drugs and devices), and *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"), to *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), in part, on the due process protections of the Fourteenth Amendment), the *Lawrence* Court tracked the expansion of personal privacy rights recognized by the Supreme Court.

The *Lawrence* Court also noted that the recognition of personal privacy rights with respect to sexual choices may conflict with ethical, moral, and religious beliefs, but warned that the State may not use

the criminal law to enforce those beliefs on the society as a whole. In doing so, the Court emphasized that Justice Steven's dissenting opinion in *Bowers* controlled in *Lawrence*:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

Lawrence v. Texas, 539 U.S. at 577-78, 123 S. Ct. 2472, *quoting Bowers v. Hardwick*, 478 U.S. at 216, 106 S. Ct. 2841 (Stevens, J., dissenting; footnotes and citations omitted).

Thus, *Lawrence* logically must be construed to ensure protection of an adult's substantive due process right to make personal choices concerning the purchase and enjoyment of sexual devices. Indeed, Justice Antonin Scalia declared as much in his dissent in *Lawrence*, where he observed that the Court's adoption of Justice Steven's dissent in *Bowers* with respect to *not*

criminalizing certain personal sexual choices would effectively obliterate Government regulation of private sexual conduct on the basis of moral conceptions, including obscenity:

> This effectively decrees the end to all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational basis review.

Id. at 599, 123 S. Ct. 2472.

Whether Justice Scalia's prediction concerning to the effect of *Lawrence* on obscenity laws is that pronounced of a departure from current law is debatable. This Court long ago ruled that, under the First and Fourteenth Amendments, the Government may not "tell [ ] a man, sitting alone in his own house, what books he may read or what films he may watch" even if such works are obscene as a matter of law. *Stanley v. Georgia*, 394 U.S. 557, 559, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). Continuing to prohibit *public* use of sexual devices in a lewd manner, but allowing the purchase of sexual devices for personal use by adults would hardly be a shocking or unreasonable advancement of personal privacy rights in the wake of *Lawrence*.

Moreover, the Court's consideration of the petitioners' constitutional objections is particularly important and necessary in light of the Eleventh Circuit's recent decision in *Williams v. Attorney General*

of Alabama, 378 F.3d 1232 (July 28, 2004). There, the majority of the Circuit Court held that consenting adults do not have a substantive due process right to engage in private intimate sexual conduct. *Id.* at 1250. Petitioners submit that the *Williams* decision cannot be reconciled with this Court's decision in *Lawrence*.

The Eleventh Circuit's refusal to invalidate Alabama's law criminally proscribing the commercial sale of sexual devices was premised, in part, on the Circuit Court's view that *Lawrence* did not provide a foundation for recognition of a right of sexual privacy guaranteed by substantive due process. *Id.* at 1235-36. However, as Circuit Judge Barkett pointed out in her dissent, the majority's interpretation of *Lawrence* is, simply, wrong:

> The majority's decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity. These premises directly conflict with the Supreme Court's holding in *Lawrence v. Texas*.

Id. at 1250 (citation omitted).

Accordingly, this Court's review of the petitioners' constitutional objections to Georgia's criminalization of the dissemination of sexual devices to consenting adults for use in their private sexual lives will also have the additional salutary effect of resolving

the Eleventh Circuit's misinterpretation of *Lawrence*. Petitioners submit that, as shown by this Court's thoughtful and cautious substantive due process analysis in *Lawrence*, an explicit recognition of their constitutional rights to sell sexual devices to adults for use in private is not so much an extension of *Lawrence* as it is inherent in the understanding that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence v. Texas*, 539 U.S. at 562, 123 S. Ct. 2472. Consonant with the Court's warning in *Lawrence* that a State cannot burden private intimate activity in order to advance publicly imposed morality, Georgia's ban on the dissemination of sexual devices should be struck down.

POINT II

The City of Marietta Cannot Constitutionally Revoke Petitioners' Licenses and Demand That Petitioners Cease the Dissemination of Expressive Materials Protected by the First Amendment Because of Past Sales of Sexual Devices

Assuming, *arguendo*, that Georgia can lawfully proscribe the dissemination of sexual devices, the City of Marietta cannot constitutionally prohibit the petitioners from using their premises to display and sell books, magazines, and films that are protected by the First Amendment. Such a prohibition would constitute an unlawful prior restraint based on past, alleged criminal law violations unrelated to the content of the expression petitioners disseminate.

The use of past obscenity convictions to prevent the future operation of a business engaged in protected expression has been condemned by this Court as an unconstitutional prior restraint of free speech. For example, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d. 413 (1980), the Court struck down a Texas nuisance statute that authorized courts, "on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene." *Id.* at 311, 100 S. Ct. 1156. *See also, Gayety Theaters v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983).

In the instant case, the City has revoked the petitioners' licenses to sell presumptively protected books, magazines, and films that have not even been challenged as obscene, much less determined in a court of law to be outside the ambit of First Amendment protection. This is a classic prior restraint of future lawful expression on the impermissible basis of past violations of law, and granting of the petitioners' request for a writ of certiorari is warranted to remedy this constitutional violation.

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Supreme Court of Georgia so that they may have a full and fair opportunity to vindicate their rights under the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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